IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of	:	Sudhindra P. Herle
Serial No.	:	10/600,223
Filed	:	June 20, 2003
For	:	APPARATUS AND METHOD FOR PERFORMING AN OVER-THE-AIR SOFTWARE UPDATE IN A DUAL PROCESSOR MOBILE STATION
Art Unit	:	2191
Examiner	:	Satish Rampuria
Confirmation No.	:	9788

MAIL STOP AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal. The review is requested for the reason(s) stated in the arguments below, demonstrating the clear legal and factual deficiency of the rejections of some or all claims. Claims 1-24 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Publication No. 2004/0068721 to O'Neill et al., hereinafter "O'Neill" in view of

U.S. Patent Publication No. 2007/0142083 to Cupps et al., hereinafter "Cupps". For the convenience

of the panel, Claim 1 requires:

> 1. A wireless communication device capable of accessing a
> wireless network and downloading a software upgrade file
> therefrom, said wireless communication device comprising:
> a first central processing unit (CPU) capable of controlling
> wireless communications with said wireless network;
> a first memory associated with said first CPU;
> a second central processing unit (CPU) capable of
> executing at least one end-user application on said wireless
> communication device; and
> a second memory associated with said second CPU,
> wherein said first CPU downloads said software upgrade
> file from said wireless network and stores said downloaded
> software upgrade file in said second memory.

As discussed at length in previous responses, Claim 1 clearly requires a wireless

communication device having two CPUs, where the first CPU can control wireless communications

and the second CPU can execute an application. The first CPU downloads a software upgrade file

and stores it in a memory associated with the second CPU. Claim 13 includes similar limitations.

These are not taught or suggested by any art of record, alone or in combination, and so the rejections

are legally and factually deficient..

The Examiner concedes that O'Neill does not teach these limitations. Cupps also fails to

teach or suggests a wireless communication device having two CPUs that operate as claimed.

The Examiner refers to Cupp's paragraphs 0013 and 0119, reproduced in a prior response.

The Examiner is correct that Cupps describes a handheld device with dual processors, and

each of those processors is allocated a separate memory portion. Cupps can fairly be read to describe

a first CPU associated with a first memory portion and a second CPU associated with a second

memory portion. Cupps even describes, in paragraph 0061, and embodiment using three processors,

including a phone module ARM 7 core processor that manages wireless transmissions and a mobile processor that can handle other office automation tasks, such as word processing.

Still, neither Cupps nor O'Neill, nor any combination of them, teaches or suggests that the *first* CPU downloads a software upgrade file from a wireless network and stores the downloaded software upgrade file in *second* memory, associated with the second CPU. Nothing in Cupps or O'Neill teaches that this would be desirable or operable, or that there would be any predictable result or likelihood of success. The Examiner doesn't even address this limitation in his rejection or in the Advisory Action, and the rejection is legally deficient for failing to be a *prima facie* obviousness rejection.

As Cupps specifically describes that each of its two processors is allocated its own separate memory, it appears that a processor in Cupps' system *would not be capable* of performing as described, which would require one processor to access the memory dedicated to the other processor.

In fact, Cupps describes in paragraph 0175 that "system processor 302 is self-contained, and the software applications that run within the embedded operating environment are considered 'closed.' Specifically, in a 'closed' environment, the software used is specified by the developer of the embedded system and may not be upgraded or modified by the user of the embedded operating system. In addition, no new software may be introduced to the embedded system by the user".

The Examiner's suggested "motivation" has nothing at all to do with the particular claim limitation of the first CPU downloading a software upgrade file from a wireless network and storing the downloaded software upgrade file in second memory, associated with the second CPU, as claimed. This concept is not considered at all by any combination of the references.

Applicant further notes that the relevant teachings of the O'Neill reference (hereafter O'Neill '721) do not appear to be prior art to this application. This application was filed on June 20, 2003;

O'Neill was filed on July 31, 2003, more than a month later. O'Neill is a continuation-in-part of application No. 10/311,462, filed May 13, 2003 (from a PCT filed November 18, 2001), now published as US 2003/0182414 (hereafter O'Neill '414). While O'Neill '414 clearly qualifies as 102(e) prior art to this application, the CIP O'Neill '721 is only 102(e) prior art <u>for that subject matter supported by its parent application, O'Neill '414</u>.

Applicant respectfully notes that the teachings on which the Examiner relies in O'Neill '721 <u>are not supported by O'Neill '414</u>, and are not entitled to any filing date earlier than July 31, 2003, <u>after</u> this application. The Examiner is invited to consider whether O'Neill '414 supports the current rejections. Applicant respectfully suggests that O'Neill '414 does not support the current rejections, and so the current rejections over the new matter presented in O'Neill '721 are improper.

O'Neill '414 does not include the Figure 2 and related discussion on which the Examiner relies. If the Examiner were to show the subject matter in Figure 2, one which he relies, in one of the parent applications to O'Neill '721, then perhaps he could show a proper rejection, relying on an incorporation by reference. But he has not, and the rejection in its present form is legally deficient.

All rejections will be reversed on appeal. As the Examiner has already forced this case to appeal once, and then reopened prosecution with another flawed rejection, Applicant respectfully requests that all claims be allowed at this time.
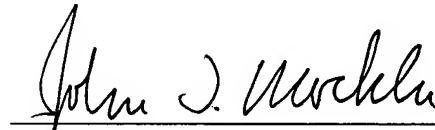
CONCLUSION

As a result of the foregoing, the Applicant asserts that the claims in the Application are in condition for allowance over all art of record, and that the rejections are both factually and legally deficient, and respectfully requests this case be returned to the Examiner for allowance or, alternatively, further examination.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Munck Carter Deposit Account No. 50-0208.

Respectfully submitted,

MUNCK CARTER, P.C.

Date: *Jan. 23, 2009*

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